TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 220.

WILLIAM S. ELDER, AS ADMINISTRATOR OF THE ESTATE OF RUFUS WILSEY, DECEASED; ELIZABETH WILSEY, ET AL., PLAINTIFFS IN ERROR,

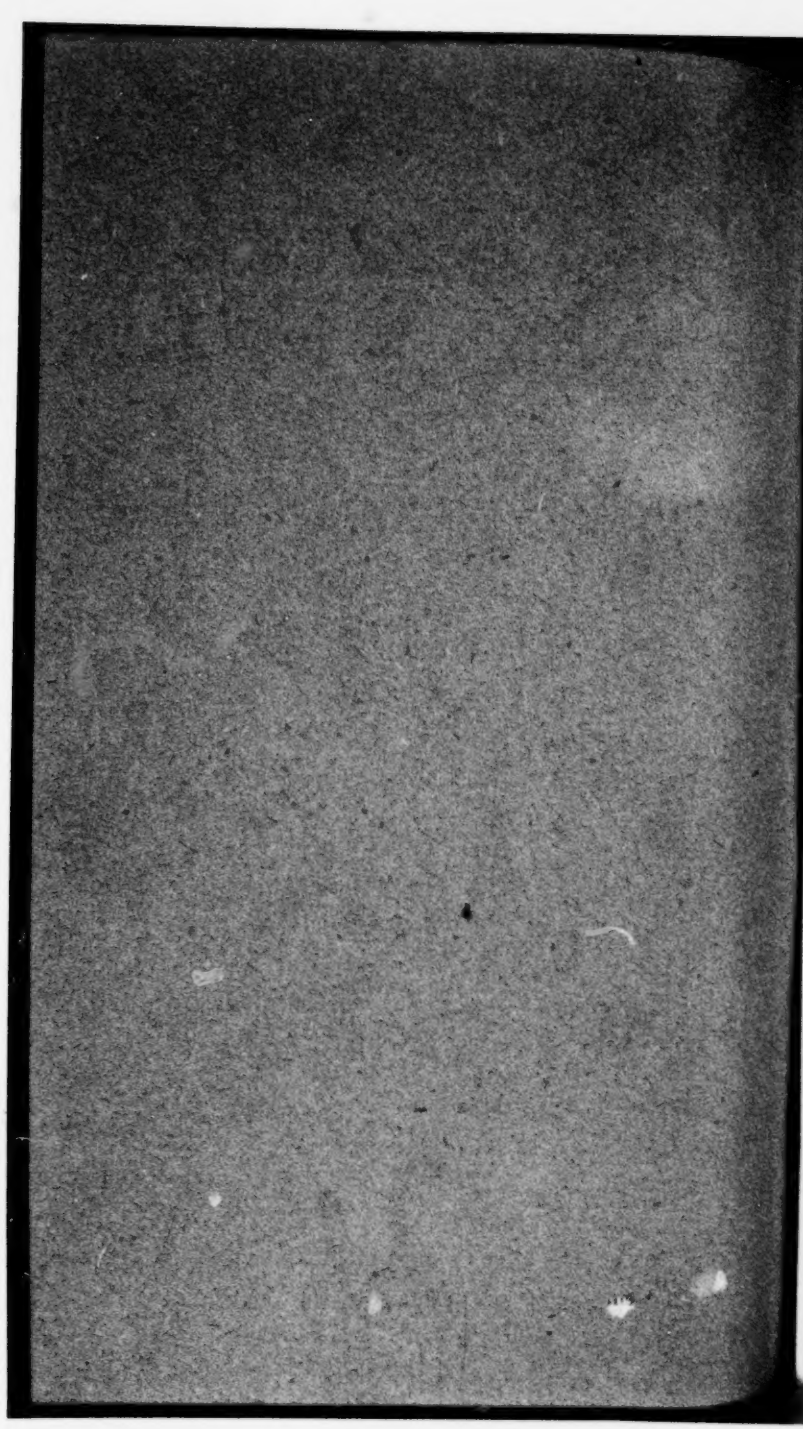
vs.

THE HORSESHOE MINING AND MILLING COMPANY; JOSEPH M. THOMAS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

FILED FEBRUARY 13, 1903.

(18,838.)



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INDEX.

		Original.	Print.
aption	(omitted in printing)	a	—
bstract on appeal	(parts omitted in printing)	1	1
Statement	(omitted in printing)	1	—
Complaint		2	1
Answer		8	5
Findings of fact		17	10
Conclusions of law		28	18
Judgment		30	19
Appeals	(omitted in printing)	31	—
Assignment of errors	(" ")	31	—
Index	(" ")	33	—

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	Original.	Print
Judgment	34	19
Opinion filed 1901	39	21
Opinion filed 1897	42	22
Certificates to record (omitted in printing)	54	—
Assignment of errors (" ")	55	—
Citation and service	57	29
Writ of error	59	31
Bond on writ of error	61	32
Assignment of errors and designation by plaintiff in error of parts of record to be printed	64	34
Designation by defendant in error of parts of record to be printed	68	35

* * * * * * *

a-2 *Complaint.*

Plaintiffs complain and allege:

1. That during the year 1879, one Rufus Wilsey, hereinafter referred to, died interstate in Lawrence county, Dakota, being at the time of his death a resident of said county and Territory; that on the 8th day of July, 1881, one John M. Stephens was duly appointed as administrator of the estate of said Rufus Wilsey, deceased, by the probate court of Lawrence county, and thereupon duly qualified and entered upon the discharge of the duties of his office as such administrator; that thereafter the said John M. Stephens, deceased, and such proceedings were had that on the 12th day of August, 1893, the above named William S. Elder was by the county court of Lawrence county, South Dakota, duly appointed as administrator of the estate of said Rufus Wilsey, deceased, in the place and stead of the formed administrator of the said estate, and he thereupon duly qualified and entered upon the discharge of his duties as such administrator, and is still such administrator and acting as such; the plaintiffs, Elizabeth Wilsey, George Warren Wilsey, Charles Lincoln Wilsey, Edward Wilsey and Frank Wilsey, are the heirs at law and the only heirs at law of the said Rufus Wilsey, deceased.

2. Upon information and belief that the defendant, The Horseshoe Mining and Milling Company is a corporation, duly organi-ed and existing under and by virtue of the laws of the State of South Dakota.

3. Upon information and belief that on or about the 21st day of January, 1878, the said Rufus Wilsey and C. H. Havens, citizens of the United States, and persons fully qualified to locate,
3 claim and obtain title to the mineral lands of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States, in the county of Lawrence, Territory of Dakota, and duly located and appropriated under the mining laws of the United States and of the Territory of Dakota, the Golden Sand lode or mining claim, three hundre-(300) feet in width by fifteen hundred (1500) feet in length; twelve hundred feet thereof extending southwesterly from the discovery shaft, and three hundred (300) feet northeasterly from the said shaft, the said lode and mining claim being situated on the divide between Middle Deadwood gulch and a branch of Spearfish creek, about two thousand (2000) feet east of the Portland lode and about five (5) miles from Poorman gulch. Location certificate whereof is recorded in Book 9, page 62, in the office of the register of deeds of Lawrence county, South Dakota; the discovery shaft being about forty (40) feet from Bear Gulch trail, in Whitewood Quartz mining district, Lawrence county, now in the State of South Dakota; that the said

Rufus Wilsey, at the time of his decease in the year 1879 was seized and possessed of an undivided one-half (½) interest in and to the said Golden Sand lode or mining claim, and the plaintiffs are now the owners and entitled to the possession of an undivided one-half (½) interest in said property.

4. Upon information and belief that the said Rufus Wilsey and C. H. Havens, during the lifetime of the said Rufus Wilsey, did and performed all work and labor required under the laws of the United States and of the Territory of Dakota for the development and holding of said property and the protection and perfection of title thereto; performing for every year improvement and development work upon said property of the value and to the extent of at least one hundred dollars ($100) per year. That since the decease of the said Rufus Wilsey, up to and including the year 1891, the proper
4 amount of labor and development work in the sum and to the value of at least one hundred dollars ($100) per year has been done and performed upon the said property by the said C. H. Haven, and all things required under the laws of the United States and of the Territory of Dakota and the State of South Dakota to perfect and protect title to said property has been done and performed from time to time as required by law; and the Golden Sand claim was during the year 1892 and all times before and since a valid and subsisting mining claim.

5. Upon information and belief that on or about the 10th day of August, 1892, the said C. H. Haven assumed to sell to the defendant, Thos. H. White, and the defendant, The Horseshoe Mining and Milling Company, the said Golden Sand mining claim and lode for the sum of five thousand dollars ($5000) and the said defendants, Thos. H. White and The Horseshoe Mining and Milling Company, assumed to purchase the said Golden Sand claim from the said C. H. Haven, paying the said C. H. Haven the sum of five thousand dollars ($5000) therefor, and taking deed of conveyance of said property from C. H. Haven in the name of the defendant, Thomas H. White, which said deed of conveyance was on the 31st day of August, 1892, recorded in Book 64, page 390, of the records of the office of register of deeds of Lawrence county, South Dakota; that at the time of the said purchase and the said conveyance neither the said Rufus Wilsey nor his heirs or administrators had disposed of nor parted with an undivided one-half (½) interest in said property belonging to the said Rufus Wilsey and to his estate, and the said C. H. Haven had no right or authority to sell or dispose of the undivided one-half (½) interest in the said claim, belonging to the plaintiffs, or any portion thereof, of all of which the defendant-, Thomas H. White and The Horseshoe Mining and Milling Company had notice.

5 6. That prior to the commencement of this action the plaintiffs duly tendered to the defendant-, Thomas H. White and The Horseshoe Mining and Milling Company, one-half (½) of the expenditures made by the said defendants, or by their grantors upon the said property, for the purpose of doing and performing the annual assessment and development work upon the said property at

all times since decease of the said Rufus Wilsey, which tender and offer was declined by the defendants. These plaintiffs now offer to pay the said defendants one-half (½) of any and all sums so expended by the said defendants or either of them in the protection, development and preservation of said property.

7. That notwithstanding the said Golden Sand lode and mining claim was during all of the year 1892 and at all times from the date of its location aforesaid, and is now a valid, subsisting mining claim, and not subject to relocation or forfeiture; that, nevertheless, the plaintiffs complain upon information and belief that on or about the 22nd day of August, 1892, the defendants, Thomas H. White and The Horseshoe Mining and Milling Company, for the purpose, if possible, of depriving the plaintiffs of the undivided one-half interest in and to said mining claim and property wrongfully and without right, made an attempted location and appropriation of the said Golden Sand lode or mining claim by attempting to locate a pretended mining claim, known as the "North" lode or mining claim, over and upon the identical ground embraced within the boundary lines of the said Golden Sand claim, making said attempted and pretended location in the name of one Joseph M. Thomas, a relative of Thomas H. White, and now as then in the employ of the said defendant that in attempting to make said "North" location the said parties made no new discovery, but simply adopted the discovery of the said Golden Sand claim, and
6 also adopted the stakes of the said Golden Sand claim, and on the 10th day of September, 1892, filed for record in the office of the register of deeds of Lawrence county, South Dakota, a pretended location certificate of the said "North" claim; that all of the said acts of the defendants and each of them were done entirely without the knowledge of these plaintiffs, or either of them, that at that time the former administrator of the estate of Rufus Wilsey, deceased had deceased, and the appointment of the present administrator had not been made; that all of the plaintiffs, except the administrator, are now and have been at all times during the periods alleged in this complaint non-residents of the State of South Dakota and of the Territory of Dakota; a portion of them residing in the eastern part of the State of Iowa, and one of the plaintiffs is residing in another Western State; that in the said pretended location notice and certificate the defendants made no mention of the fact that the pretended North location is a relocation of the said Golden Sand lode or mining claim.

Plaintiffs further allege upon information and belief that the defendant, Thomas H. White and The Horseshoe Mining and Milling Company, then proceeded with all haste to make an entry of the said "North" claim in the United States land office at Rapid City district, South Dakota, and entered the same and received receaver's receipt therefor on or about the — day of ——, 1893, taking the said receiver's receipt in the name of said Joseph M. Thomas; that all of said acts were done and performed by the defendants without the knowledge of these plaintiffs or either of them; none of the

plaintiffs became aware of the said fact until after the completion of the said entry and the issuance of the said receiver's receipt, and that the said acts in this complaint referred to were each and all done by the said defendants for the purpose of, if possible, wrongfully and without right depriving these plaintiffs of their
7 undivided one half interest in and to said Golden Sand claim or lode; that on the 29th day of November, 1893, the said defendant, Thomas H. White and The Horseshoe Mining and Milling Company, caused a deed of conveyance of the said North lode to be acknowledged, executed and delivered by the defendant, Joseph M. Thomas, to the defendant, The Horseshoe Mining and Milling Company, and on the 29th day of November, 1893, the said defendants caused the deed to be filed for record in the office of the register of deeds of Lawrence county, South Dakota, and the record title of said property is now standing in the name of the defendant, The Horseshoe Mining and Milling Company.

8. That if these plaintiffs had known or could have ascertained that the application of the defendants for patenting the North lode or mining claim was for the property embraced within the boundaries of the Golden Sand lode or mining claim, these plaintiffs would have protested against and adversed the said application of the defendants for patent to the said North lode and mining claim, but the defendants by concealment of the fact that the North claim was an attempted location of the Golden Sand lode or mining claim, and by their other acts of concealment of their attempt to deprive the plaintiffs of their interest in said property, have prevented the plaintiffs from knowing that the defendants were seeking title to the Golden Sand lode or mining claim. If the defendants, by their conduct in this behalf, should be permitted to hold the whole of the said North lode or mining claim in their own right and against the interests of the plaintiff, it would work a great fraud and irreparable hardship and injury upon the rights of the plaintiffs in and to the said undivided one-half interest in said property.

9. That prior to the commencemant of this action the
8 plaintiffs tendered to the defendants, Thomas H. White and The Horseshoe Mining and Milling Company, one-half of any and all expenses incurred by the said defendants, or either of them, in locating and improving the ground embraced in *in* the said North lode or mining claim, and also one-half of the expenses of entering the said land for patent, at the same time requesting a deed for an undivided one-half interest in the said property, and the said defendants declined to accept the said tender, and refused to execute to the plaintiffs, or any of them, a deed for any interest in said property; that the plaintiffs are still willing and able, and offer in this court to repay to the defendants one-half of any and all expenses or expenditures incurred or made by the defendants, or either of them, in the said behalf.

10. That there are claims amounting to several hundred dollars existing against the estate of the said Rufus Wilsey, deceased, which have been allowed, and that the only property out of which the

same or any portion thereof can be paid is the interest of the estate in the said Golden Sand lode and mining claim, there being no other property left belonging to said estate.

Wherefore plaintiffs pray judgment.

(1.) That the defendant, The Horseshoe Mining and Milling Company, be decreed to hold in trust for the plaintiffs an undivided one-half interest in and to the land embraced in the said North lode or mining claim, and that it be decreed to convey to the plaintiff, William S. Elder, administrator of the said estate, an undivided one-half interest therein by good and sufficient deed, or to the plaintiffs, as the court may see just and proper. (2) For costs. (3.) For such other and further relief as may be just and equitable. (Verified)

Transcript p. 4–12.

Answer.

Now come the defendants in the above entitled action,
9 and by leave of court makes this their answer to the complaint of the plaintiffs herein.

1. As to each and every of the statements and allegations contained in paragraph one, of this complaint, these defendants deny that they have any knowledge or information sufficient to form a belief.

2. These defendants admit that the Horseshoe Mining and Milling Company is a corporation, as alleged in paragraph two, of the complaint.

3. As to each and every of the statements and allegations contained in paragraph three, of said complaint, these defendants deny that they have any knowledge or information sufficient to form a belief, except that whatever may be the facts as to the statements and allegations therein contained, these defendants expressly deny that the plaintiffs are now the owners or were at the time of the bringing of this action the owners, or entitled to the possession of an undivided one-half interest in the alleged Golden Sand lode, or that either of said plaintiffs was or is an owner or entitled to the possession of the same or any part thereof.

4. As to each and every of the statements and allegations contained in paragraph four, of said complaint, these defendants deny that they have any knowledge or information sufficient to form a belief.

5. These defendants admit that on or about August 10, 1892, C. H. Havens sold to the defendant, Thomas H. White, for his co-defendant, The Horseshoe Mining and Milling Company, not then created but in contemplation, whatever right, title or interest the said C. H. Haven had in the said so-called Golden Sand lode or mining claim, for the sum of $5,000, and that the said defendant, Thomas H. White, for his co-defendant aforesaid, purchased the same of the said C. H. Havens and paid him therefor the said sum of
10 $5,000, and thereupon took a deed of conveyance therefor from the said C. H. Havens in the name of Thomas H. White,

which was an ordinary deed of grant, bargain, sale and quit claim, and which was recorded on the 31st day of August, 1892, in Book 84, at page 390, of the records in the office of the register of deeds of Lawrence county, South Dakota; but these defendants deny that at the time of the said purchase and the said conveyance the said Rufus Wilsey, or his heirs or any administrator assuming to act for his estate, had an undivided one-half interest, or any interest whatever, in said so-called Golden Sand lode, or that the said C. H. Havens had no right or authority to sell or dispose of said undivided one-half interest, so claimed by plaintiffs, but allege the fact to be that if the said so-called Golden Sand lode or mining claim was in any particular a valid or subsisting mining claim, (as to which, as before stated, these defendants deny that they have any knowledge or information sufficient to form a belief) nevertheless, the said C. H. Havens was, at the time of his sale in the sole, exclusive and undisputed possession of the whole thereof, claiming and asserting in himself the sole title thereto, and that he had good and lawful right to the whole and to each and every portion thereof, and authority to sell and convey the same, and that the plaintiffs had no right, title or interest therein; and these defendants further allege in this connection and in this behalf upon their information and belief, that long prior to any purchase by defendant, Thomas H. White, from C. H. Havens, of the said so-called Golden Sand lode or mining claim, or the right, title or interest of said C. H. Havens therein, to-wit, from the years 1880 to 1888 inclusive, the same was claimed to be the joint property of C. H. Havens and one Rufus Wilsey, (but as to the sufficiency or legality of their claim these defendants, as before stated, deny that they
11 have any knowledge or information sufficient to form a belief) and that during each and every of said years the said Rufus Wilsey failed to contribute his proportion or any proportion, sum or amount whatever, of the expenditures required to hold the same as a located mining claim, or to do or perform any part or portion whatever of the $100 worth of labor required to be performed annually upon a located mining claim, and that the said C. H. Havens, during said years, did and performed such work and labor, and contributed the same annually to the extent of $100, and upon the failure of said Rufus Wilsey to contribute any proportion thereof, as aforesaid, the said C. H. Havens gave to him, his heirs, and administrator, and to whom it might concern due notice by publication in the newspaper published nearest the claim, to-wit, in the Belt Herald, published in Lead City, Lawrence county, for at least once a week for ninety days, claiming a forfeiture by the said Rufus Wilsey of his alleged interest in said so-called Golden Sand lode or mining claim, for a failure to contribute his proportion of the expenditures required by law upon said claim during the year aforesaid, to-wit: that said C. H. Havens published a notice claiming a forfeiture as against said Rufus Wilsey for his failure to do or contribute his proportion of said work for and during the years 1880 to 1887 inclusive, in the said Belt Herald for and during the period of ninety

days, from January 2, 1889, to April 2, 1889, inclusive, and also published in said paper a further notice claiming a forfeiture against said Rufus Wilsey for his failure to contribute his share or proportion of the work during the year 1888, which notice was published in the paper aforesaid for and during a period of ninety days, from January 2, 1889, to April 2, 1889, inclusive, and that affidavits of such publications were duly made by A. W. Merrick, as publisher of said paper, and were filed for record on the 31st day of
12 May, 1889, and duly recorded in the office of the register of deeds of Lawrence county, in Book 51, at pages 637 and 638; that after April 2, 1889, the period of ninety days expired from and after the conclusion of such publication, and the said Rufus Wilsey failed and neglected to contribute any proportion of the expenditures required by law or by the said notice; and on the 25th day of August, 1892, the said C. H. Havens made affidavit to such fact, and the same was duly filed for record on that day, and duly recorded in the office of the register of deeds in and for Lawrence county, and that upon the expiration of said ninety days after April 2, 1889, and the failure of said Rufus Wilsey to respond to said notice or contribute any share or proportion of said expenditures, then and thereupon, if the said so-called Golden Sand lode or mining claim ever was a valid mining claim, or the said Rufus Wilsey ever had any interest therein, it became the property of his alleged co-owner, C. H. Havens, who claimed to have made the required expenditures, and that under and by virtue of said notice and the proceedings had by C. H. Havens in and about the same, the said Rufus Wilsey, if he ever had any interest whatever in said so-called Golden Sand lode or mining claim, wholly forfeited the same to said C. H. Havens, and the said C. H. Havens acquired thereto such title and interest as the said Rufus Wilsey might theretofore have had therein, and thereafter had good right to sell and convey the same, and these defendants expressly deny that they ever had any notice to the contrary.

6. These defendants deny that prior to the commencement of this action, or at any time the plaintiffs, or either of them, duly or otherwise tendered to the defendant, Thomas H. White, or the Horseshoe Mining and Milling Company, one-half of the expenditures made by these defendants or by anyone else upon said so-called Golden Sand lode or mining claim, for the purpose of doing or per-
13 forming annual assessment or development work upon said alleged Golden Sand lode since the alleged decease of Rufus Wilsey, but admit that they served upon defendants an offer in writing of that purport and effect, which was declined by defendants.

7. These defendants deny each and every of the stat-ments and allegations contained in paragraph seven, of the plaintiff's complaint, and the unnumbered paragraph immediately following, except as herein admitted, and in lieu thereof state the facts regarding the matters referred to in said seventh and further paragraph to be as follows: That after the purchase of the so-called Golden Sand lode or mining claim by the defendant, Thomas H. White, from the

said C. H. Havens without any waiver of whatever rights might have been acquired by said purchase as against the said C. H. Havens or against said Rufus Wilsey and the plaintiffs, the said Thomas H. White voluntarily relinquished and abandoned the so-called Golden Sand lode and mining claim, and the same became a part of the public domain, and thereupon one Joseph M. Thomas, a relative and friend of Thomas H. White, and then in his employ, located thereover and of substantially the same area the North lode and mining claim, on the 22nd day of August, 1892, and on the 10th day of September, 1892, filed for record a certificate of location of the same in the office of the register of deeds of Lawrence county and thereafter an application for patent therefor was duly made and such proceedings had, that on or about the 3rd day of May, 1893, the said North lode was duly entered for patent at the United States land office at Rapid City, S. D., and thereafter, in confirmation of said entry and in pursuance thereof, the patent of the United States for said North lode, as mineral lot No. 914, duly issued to said Joseph M. Thomas September 20, 1893, and that on the 29th
14 day of November, 1893, the said Joseph M. Thomas duly executed and delivered to the defendant, The Horseshoe Mining and Milling Company, a deed for said North lode and mining claim, which was on the same date filed for record in the office of the register of deeds of Lawrence county, and the said Joseph M. Thomas had no longer any right, title or interest in or to said property, or in this controversy, and that the foregoing, as these defendants verily believe, constitute the acts of which plaintiffs make complaint; but that the plaintiffs, and each of them, had full notice of said proceedings by the said defendants, and were chargeable by law with notice thereof. These defendants admit that the plaintiffs, other than William S. Elder, are non-residents of the State of South Dakota, and they are informed and believe that said plaintiffs, other than William S. Elder, are residents of the State of Iowa; they further admit the location notice and certificate of the North lode, made no mention that it was a relocation of the Golden Sand lode or mining claim, and they are advised that it was not necessary that they should make such mention.

8. As to each and every of the statements and allegations contained in the further and following paragraph of the plaintiff's complaint, also numbered seven, these defendants deny that they have any knowledge or information sufficient to form a belief.

9. These defendants deny that prior to the commencement of this action the plaintiffs tendered to the defendant, Thomas H. White, or The Horseshoe Mining and Milling Company, one-half of any or all expenses incurred by them or either of them, in locating and improving the ground embraced in the said North lode or mining claim, or one-half of the expense of entering the same for patent, and deny that they tendered the plaintiffs, or either of them, any sum of money whatever, but admit that a paper purporting
15 to contain an offer of that tenor and effect was served upon said defendants, together with a request for a deed, which

offer these defendants declined to accept, and also declined to execute a deed, for that they were under no duty to execute the same.

10. As to each and every of the statements and allegations contained in paragraph nine, of the plaintiffs' complaint, these defendants deny that they have any knowledge or information sufficient to form a belief, but they allege that if the said Rufus Wilsey be dead, as claimed, and any claims whatever have been filed against his estate, that they are inconsiderable and insignificant, and have long ago been abandoned or relinquished, and that the alleged ap-ointment of William S. Elder, as administrator for him, as alleged, was not induced or procured by creditors or claim holders, or in their interest, but wholly by the other plaintiffs in this action, or parties aiding or abetting them in bringing and maintaining the same, and that his alleged appointment as administrator, whether duly or otherwise made, was for the sole purpose of instituting this action against these defendants, and that said William S. Elder had no right, title or interest whatever in or to the property in controversy in this action, as administrator or otherwise, and no right to bring or maintain such action by or in his own name, or as administrator or in connection with his co-plaintiffs.

11. These defendants further allege, by way of defense to this action that if the said Rufus Wilsey, or the plaintiffs alleged to be his heirs, if he be dead, ever had any right, title or interest in the Golden Sand lode or mining claim whatever, nevertheless the same was forfeited and wholly lost to them and became the property of C. H. Havens, for a failure to contribute any proportion of the annual work and expenditures upon the said so-called Golden Sand
16 lode and mining claim during the years 1880 to 1888 inclusive, and under and by virtue of the proceedings taken thereupon by the said C. H. Havens in publishing a notice of such failure and forfeiture in the newspaper published nearest to the said claim, as hereinbefore fully recited and set forth.

12. These defendants further allege by way of a further defence to this action, that if the said Rufus Wilsey ever had any right, title or interest of any kind whatever in or to the said so-called Golden Sand lode or mining claim, or if the sand plaintiffs, alleged to be his heirs, if he be dead, ever had any right, title or interest in or to said so-called Golden Sand lode or mining claim, which they could under any theory of fact or law at any time assert as against these defendants, and the patent issued for the North lode or mining claim, yet, nevertheless, they, by their long silence, laches and neglect have lost and forfeited the same, and their claim has become stale through their own fault and omission, and they ought not now be allowed to present or assert the same.

13. These defendants further allege, by way of a further defence to this action, that the defendant, The Horseshoe Mining and Milling Company, is now the owner in fee simple of the North lode and mining claim, mineral lot No. 914, by virtue of the patent of the United States therefor, bearing date the 20th day of September,

1893; that the same was procured in due course of law, and that the plaintiffs made no protest, adverse claim or objection against the issuance thereof, and that they are now barred from objecting thereto or asserting any claim thereunder, and that they ought not to be allowed at this time to present or assert any claim against said patent or in or to the same and that their said complaint is wholly without equity or any showing of just grounds for relief as against these defendants or either of them.

17 Wherefore these defendants ask to be hence dismissed with their costs. (Verified.)

Transcript p. 14-23.

The court having announced his decision in favor of defendants, thereupon made and signed the following as his decision:

This action coming on to be heard before the court April 29, and May 2, 3, 4 and 5, 1898, the plaintiffs, appearing by their attorneys, Messrs. Martin & Mason and Frank McLaughlin, and the defendants, by their attorneys, Edwin Van Cise and G. C. Moody, and the court having heard the evidence and proofs adduced and argument of counsel, now finds and decides in favor of the defendants, and makes and files this, its decision, in the action.

Findings of Fact.

1. On or about January 21, 1878, Rufus Wilsey and Charles H. Havens, being citizens of the United States, located a mining claim near Bald mountain or Green mountain, in Whitewood mining district, Lawrence county, S. D., by discovering mineral bearing rock in place, sinking a discover- shaft, posting discovery notice and planting boundary stakes. On May 13, 1878, they caused to be filed for record their location certificate and the same was then recorded. After the Deadwood fire this was re-recorded November 14, 1879, in Book 9, page 62, of the records in the register of deeds office of Lawrence county. Its contents were as follows:

"Know all men by these presents: That we, the undersigned, have this 21st day of January, 1878, claimed by right of location fifteen hundred feet linear and horizontal measurements in length, and three hundred feet in width on the 'Golden Sand' lode, along the vein thereof, with all its spurs dips, variations and angles, together with the amount of surface necessary for working the same and allowed by law; twelve hundred feet of said lode so located and being southwesterly

18 of the discovery shaft on said lode, and three hundred feet being northeasterly of said shaft. Said lode being situated *in* supposed in Whitewood mining district, the location and bounds of said claim being marked and described more particularly as follows, to-wit: On the divide between Middle Deadwood gulch and a branch of Spearfish creek, about two thousand feet east of the 'Portland' lode or deposit, about five miles from Poorman gulch, the

discovery shaft about forty feet from Bear Gulch trail, one stake at discovery shaft, four corner stakes, two middle line stakes, two center end stakes with name of lode or deposit and date of location, and relative positions of stakes written on the same, supposed in the county of Lawrence and Territory of Dakota.

RUFUS WILSEY.
C. H. HAVENS.

Attest: WILLIAM M. PRATT.

2. After the location Rufus Wilsey wrote to some of the members of his family, plaintiffs in this case, all then and since residing at Keokuk, Iowa, that he had located a gold mine in the Black hills and had been offered a big price for it, but would not sell. On the 12th of June, 1878, Rufus Wilsey died, and was buried at Deadwood June 14, 1878. Shortly thereafter his family, plaintiffs in this action, were informed of his death by letters from friends, and also by receipt of a paper published either at Deadwood or Central City, bearing date June 13, 1878. The heirs (plaintiffs) knew that Rufus Wilsey had left property, and from a time shortly after his death corresponded with different attorneys and others residing in the Black hills to try to get something out of the estate, but until the arrangement was made with attorneys under which this action was brought, made no progress toward a settlement.

3. On June 19, 1878, Charles H. Evans was appointed
19 special administrator of the estate of Rufus Wilsey, deceased, by the probate court in and for Lawrence county, and the same day took the oath of office and entered upon the discharge of his duties.

4. On June 7, 1879, Charles H. Evans filed in said probate court his petition for letters of regular administrator, alleging that Rufus Wilsey had died intestate in Lawrence county, leaving real estate in said county, the value of which was unknown to petitioner, for the reason that it consisted of mining property, and that deceased had no heirs in the county. On June 19, 1879, Evans was appointed administrator, and the same day took the oath and filed a bond, which was approved, and he then entered upon the duties of his office.

5. On June 21, 1880, a bill of J. M. Stephens and W. T. Lowing for work done on the Golden Sand mine, located on Green mountain, on or about the first day of September, 1878, amounting to $60, and verified by Stephens, was allowed by Administrator Evans, and on September 3, 1880, was approved by the county judge at $50, and filed.

6. On January 19, 1880, a bill of C. H. Havens for "one-half the yearly assessment for labor done on the Golden Sand quartz mine or claim by C. H. Havens, $50" was verified by him before the county judge, and on the same day allowed by the latter and filed. The affidavit alleged that the work was done during the years 1879 and 1880 to hold the location, and such work was in fact done.

7. On July 5, 1881, John M. Stephens filed a petition for appoint-

ment as administrator, alleging that Evans had removed from the Territory and that petitioner was a creditor. The letters of Evans were on the same day revoked, and on August 13, 1881, Stephens was appointed, and filed his bond and oath, and entered upon his duties as administrator. On September 10, 1881, Chas.
20 Johnson, Andrew Craig and J. W. Burns were appointed appraisers to appraise the estate of Rufus Wilsey, deceased, and returned as their inventory and appraisement September 13, 1881, the "Golden Sand mine, near Bald mountain, $350." This return was verified the same day and filed in the probate court. The estate of Rufus Wilsey, deceased, has never had any property except such interest as it has claimed in the property in litigation in this action.

8. On July 31, 1893, Elizabeth Wilsey, widow of Rufus Wilsey, deceased, by Frank McLaughlin and Martin & Mason, her attorneys, filed a petition verified by Frank McLaughlin, and also accompanied by an affidavit of Elizabeth Wilsey, requesting the appointment of William S. Elder as administrator. The petition alleged that John M. Stephens was not a surviving relative of deceased, and not entitled to letters as against the surviving wife, and asked that the letters to Stephens should be revoked. On the 12th day of August, 1893, a supplemental petition on behalf of the widow, by the same attorneys, and verified by Frank McLaughlin, was filed, alleging upon information and belief the death of John M. Stephens and a vacancy in the administration, William S. Elder was thereupon appointed administrator, by order of the county court, on August 12, 1893, and filed his bond and oath. Letters were issued to him bearing that date, and he has since been the qualified and acting administrator.

9. During each and every of the years 1880 to 1888, inclusive, Charles H. Havens continued a co-owner in the Golden Sand lode and mining claim, and did at least $100 worth of labor and improvements upon the same for the purpose of holding possession of the same under the law.

10. On January 2, 1889, it being then and since the practice and custom to record affidavits of such character in Lawrence county, Charles H. Havens filed for record an affidavit made by him
21 that day, and the same was duly recorded in Book 51, at page 567, of the records in the register of deeds office of Lawrence county, as follows:

"TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

C. H. Havens, being duly sworn, says that he has performed labor and expended in labor and improvements $800 upon the Golden Sand lode or claim, in Whitewood Quartz mining district, Lawrence county, D. T., said claim being located on the divide between Middle Deadwood gulch and a branch of Spearfish creek, about two thousand feet east of Portland lode or deposit, about five miles from

Poorman gulch, the discovery shaft about forty feet from Bear Gulch trail; that said labor was done and expenditure made at the rate of $100 per year during the respective years ending December 31, 1880, 1881, 1882, 1883, 1884, 1885, 1886 and 1887, and that said expenditures were made by C. H. Havens, a co-owner of said claim, for the purpose of holding said claim in the above years.

C. H. HAVENS.
C. H. HAVENS.

Subscribed and sworn to before me this 2nd day of January, 1889.

ADONIRAM J. PLOWMAN,
[SEAL.] *Notary Public.*"

On the same day Charles H. Havens verified and filed for record an affidavit of like form that he had done $100 worth of work upon said Golden Sand lode for the year ending December 31, 1888, and such affidavit was duly recorded in Book 51, at page 566, of said records.

11. On May 31, 1889, it being then and since the practice and custom to record such instruments in Lawrence county, Charles H. Havens caused to be filed for record in the office of the register of deeds of said county an affidavit of Albert W. Merrick, publisher of the Belt Herald, accompanied by a notice headed "Notice
22 of forfeiture," and the same were recorded in said office in Book 51, at pages 637–8, as follows:

Affidavit of Publisher.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Albert W. Merrick, of said county and Territory, being first duly sworn on his oath, says: That the Belt Daily Herald is a daily newspaper of general circulation, printed and published in Lead City, in said county and territory, by A. W. Merrick, and has been such newspaper during the times hereinafter mentioned, and that I, Albert W. Merrick, the undersigned, am the publisher of said newspaper, in charge of the advertising department thereof, and have personal knowledge of all the facts stated in this affidavit; and that the affidavit headed notice of forfeiture, a printed copy of which is hereunto attached, was printed and published in the said newspaper for ninety successive issues, at least once a week for ninety days, the first publication being made on the 2nd day of January, 1889, and the last publication on the 2nd day of April, 1889; that the full amount of the legal fee for the publication of the annexed notice, to-wit, $12, inures solely to the benefit of the publisher of the Belt Daily Herald; that no arrangement or understanding for a division

thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever.

ALBERT W. MERRICK.

Subscribed and sworn to before me this 15th day of May, 1889.

[SEAL.] WALTER E. SMEAD,
Notary Public, Lawrence County, Dakota.

Notice of Forfeiture.

To Rufus Wilsey, his heirs, administrators, and to all whom it may concern:

You are hereby notified that I have expended $800 in labor and improvements upon the Golden Sand lode, said lode being described as follows: On the divide between the Middle Deadwood
23 gulch and a branch of Spearfish creek, about 2,000 feet east of the portland lode or deposit, about five miles from Poorman gulch, the discovery shaft about 40 feet from Bear Gulch trail, supposed to be in Whitewood Quartz mining district, in Lawrence county, D. T., as will appear by certificate filed on January 2, 1889, in the office of the register of deeds of said Lawrence county, in order to hold said premises under the provisions of the laws of the United States and of this Territory, that being $100 per year, the amount required to hold the claim for the years ending December 31, 1880, December 31, 1881, December 31, 1882, December 31, 1883, December 31, 1884, December 31, 1885, December 31, 1886, and December 31, 1887. And if within ninety days after this notice by publication you fail or refuse to contribute your proportion ($400, being $50 for each of said years) your interest in said claim will become the property of the subscriber under section 2324, Revised Statutes of the United States.

C. H. HAVENS."

On the same day Havens filed a like affidavit of Merrick, accompanied by a like notice, claiming for the $100 worth of work done on said Golden Sand lode during the year ending December 31, 1888, and such affidavit was recorded in Book 51, at page 638.

11. At the time of the publication of these notices the Belt Herald was a daily newspaper of general circulation published in Lead City, Lawrence county, then Territory of Dakota, now the State of South Dakota, and was the newspaper published nearest the Golden Sand lode and mining claim. And the notices just referred to and one set out in full, were published in each daily issue of such paper (every day of the week except Sunday) beginning Monday, January 7, 1889, and concluding Tuesday, April 2, 1889, and no more, but Mr. Merrick was misled into making the affidavit as he
24 did by following the entry in his books instead of examining the files of the paper, and by the fact that the advertisement

was charged in his books upon a page whose top date was January 2, 1889, although later down the page and preceding this charge a date of January 3, 1889, was interlined.

12. After the publication of these notices Charles H. Havens continued to work upon the Golden Sand lode and mining claim, and with the help of his son did in each of the years 1889, 1890, 1891 and 1892, at least $100 worth of work and improvement upon said claim; for the purpose of holding and maintaining the possession thereof. On September 25, 1890, for a stated consideration of $50, Charles H. Havens executed a grant, bargain and sale deed to the Deadwood Central Railroad Company for a strip of land fifty feet wide across the Golden Sand lode for use for railroad purposes and for right of way, reserving the minerals and right to extract the same. This deed was recorded September 26, 1890, in Book 78, at page 278, of the records in the register of deeds office of Lawrence county. On December 8, 1890, for a stated consideration of $125, Havens made a like deed of a fifty foot strip to the Freemont, Elkhorn & Missouri Valley Railroad Company. This deed was recorded December 19, 1890, in Book 78, at page 340, of the same records. On December 12, 1891, Havens made a like deed for a fifty foot strip to the Grand Island & Wyoming Central Railroad Company for a stated consideration of $75, and this deed was recorded December 21, 1891, in Book 87, at page 42, of the same records. On August 10, 1892, Havens made a grant, bargain and sale deed of the whole Golden Sand lode and mining claim to Thomas H. White for a stated consideration of $5,000, and on August 31, 1892, this deed was filed for record and recorded in Book 84, at page 390, of the same records.

25 13. On August 25, 1892, Mr. White caused to be filed for record an affidavit of Charles H. Havens, subscribed and sworn to before White as a notary public, in the same month, but day of the month omitted from his jurat, which recited that he was one of the locators of the Golden Sand lode, and that Rufus Wilsey, his co-owner, and whom he had advertised out for not contributing his proportion of labor for the purpose of holding said claim, had not paid his proportion or any of said expenditure for holding said claim. And said Wilsey and his heirs, plaintiffs in this action, failed to contribute such proportion, and did not prior to December 5, 1893, offer to contribu-e any part of it.

14. At this time Thomas H. White was acting as the local representative of some persons who subsequently formed the Horseshoe Mining and Milling Company, and this purchase was made with funds furnished by them for said company, their corporation then being in contemplation and afterwards formed with White as general manager. After the purchase by White he caused the claim to be relocated as the North lode in the name of his nephew, Joseph M. Thomas, adopting the same boundaries as those of the Golden Sand, and on the 22nd day of August, 1892, caused a certificate of such location as the North lode, signed by Joseph M. Thomas, and bearing that date, to be filed for record in said register of deeds office,

and the same was duly recorded in Book 83, at page 65, of said records of Lawrence county. About the same time Thomas and another person were put to work upon the claim, and ran during that fall and winter about 200 feet of tunnel and drift upon the claim. The said Joseph H. Thomas had no actual interest in the said property or in the said proceedings; but his name was used by Thomas H. White, and the proceedings taken in the interest of the de-
26 fendant corporation afterwards formed, and expenditures and disbursements were made by or on behalf of the said corporation. In making the location of the "North" lode no new discovery was made, and no staking of the claim as the "North" claim was made, and the old stakes of the "Golden Sand" claim were not remarked as new stakes; no notice of discovery of the so-called "North" claim was at any time posted upon the claim, and the location certificate of the "North" lode made no mention of the fact that it was a relocation of the "Golden Sand" lode or of any other claim. (The foregoing beginning with the words "In making the location, etc.," and thence to the end of the paragraph is excepted to by counsel for the defendants.)

15. On September 26, 1892, Messrs. Martin & Mason wrote and mailed from Deadwood to Edward Wilsey, the representative and agent of the heirs of Rufus Wilsey, deceased, plaintiff in this action, all at that time and also on January 2, 1889, being 21 years of age and over, and consisting of Elizabeth Wilsey, the widow, and the following sons: Edward Wilsey, George W. Wilsey, Charles L. Wilsey and Frank Wilsey, a letter, received by said Edward Wilsey in the ordinary course of mail, as follows:

"The Golden Sand, in which your father was interested, has recently been sold, as you probably have been already advised. We think it quite possible that the proceedings taken to advertise your interest out of this property are not valid, and could be set aside should you care to bring suit for that purpose.

Very truly, MARTIN & MASON."

16. On December 14, 1892, Mr. White caused the North lode to be surveyed for an application for patent. The survey was approved by the surveyor general January 28, 1893. The notice and diagram were posted February 10, 1893, not on this claim, but on a mining claim immediately adjoining, known as the "Beaver Frac-
27 tion" claim, within a few feet of the "North" Lode line and a short distance from the public highway; the application for patent sworn to the same day, publication begun shortly thereafter, and other proceedings had, so that on May 3, 1893, the claim was entered for patent as lot No. 914, in the name of Joseph M. Thomas, at the United States land office at Rapid City, and receiver's receipt issued to him in pursuance thereof. The various acts of the defendants in connection with the relocation of the "Golden Sand" claim under the name of the "North" lode, and the survey and entry of the same for patent, and all proceedings in connection therewith, were done and had without the actual knowledge of the

plaintiffs or either of them. (The foregoing from the words "The various acts of the defendants" and thence to the end of the paragraph is excepted to by counsel for defendants.

17. On July 1, 1893, articles of incorporation of the Horseshoe Mining and Milling Company were prepared, and on July 7, 1893, a charter or certificate of incorporation from the secretary of state came to said company at Deadwood, and it has since been engaged in the mining business in Lawrence county. On September 20, 1893, the patent for the North lode was issued to Joseph M. Thomas. It was filed for record September 18, 1894, and recorded in Book 100, at page 451, of the records in the register of deeds office of Lawrence county. On November 20, 1893, Joseph M. Thomas made his deed for a stated consideration of one dollar of all his right, title and interest in the North lode, lot No. 914, to the Horseshoe Mining and Milling Company, which was filed for record November 29, 1893, and duly recorded in said office in Book 97, at page 153.

18. On or about June 15, 1893, the heirs of Rufus Wilsey, deceased, plaintiffs in this case, arranged with their attorneys for a consideration of one-half of whatever should be realized from the estate, to bring this suit and prosecute as far as necessary to
28 effect a recovery of the interests of the estate, the heirs to contribute $100 toward the costs and expenses, of which they have paid $10. On June 15, 1893, four of the heirs, Elizabeth Wilsey, George W. Wilsey, Frank Wilsey and Edward Wilsey, executed their deed to Frank McLaughlin for an undivided one-fourth interest in the Golden Sand lode, which deed was filed for record October 30, 1894, and recorded in Book 97, page 361, of the records in the register of deeds office of Lawrence county.

19. On December 5, 1893, the plaintiffs, by their attorneys, served on Thomas H. White and the Horseshoe Mining and Milling Company an offer in writing to pay $700 for annual development and assessment work done by said White and said company, or their grantors, and if that was not the correct amount expended for the protecting of the half interest in the Golden Sand lode then to pay the full amount done by them or their grantors for the protection of such half interest, and asking a receipt; also offering to pay one-half of the expense of the location and entry of the North lode, and demanding a deed for such half interest. The offer and compliance with the request were refused. This action was begun by the service of summons December 6, 1893.

20. Subsequent to July, 1889, processes for the successful treatment of Bald Mountain ores, including such ore as was found in the ground in controversy, were introduced in Lawrence county, and works for their application and use erected in said county, and as a consequence value of mining property in the vicinity of Bald Mountain, including the claim in controversy, were materially enhanced, and said claim was of much greater value in August, 1892, and December, 1893, than at any time in 1889 or prior thereto.

Conclusions of Law.

1. The Golden Sand lode was on June 12, 1878, a valid mining claim, and that on that day, on the death of Rufus Wilsey, a one-half interest passed to his heirs, named in the complaint in this action, and the other half was in Charles H. Havens, as co-owner.

2. The heirs of Rufus Wilsey, plaintiffs as aforesaid, having failed to contribute their proportion of the expenditures required by law, upon the Golden Sand lode, for the years 1880 to 1888, inclusive, were delinquents under the statute, and Charles H. Havens *os* co-owner, having performed the labor and made the improvements, he was entitled to give such delinquent co-owners notice thereof, and the notices published by him in the Belt Daily Herald, a newspaper published nearest the claim, for at least once a week for ninety days, were such notices as are authorized and contemplated by law, and were published as provided by law, and the failure of said delinquent co-owners (plaintiffs in this action) to contribute their proportion of the $900 called for by said notices, within ninety days after such publication, operated at the expiration of such period, to-wit, July 6, 1889, to divest the interest of said delinquent co-owners and their interest in the Golden Sand lode and mining claim thereupon became the property of Charles H. Havens.

3. The assertion of title to the whole of the premises in controversy by Charles H. Havens from and after July 6, 1889, was such as to put the heirs (plaintiffs in this action) on inquiry and give them notice; Thomas H. White succeeded to the title and possession of the whole by his deed from Havens, and thereafter held adversely to said plaintiffs; and his abandonment of the property and location of it as the North lode, in the name of his nephew, and subsequent entry and patent in his name, was not in any manner a wrong or fraud upon said plaintiffs, and their failure to adverse the application for patent precludes them from assailing such entry and patent; and there is no relation of trust between them and defendants, nor any ground for declaring a trust in their favor.

4. The plaintiffs, heirs at law of Rufus Wilsey, deceased, have been guilty of such gross laches and unexcused neglect in reference to the property in controversy, and such delay in the assertion of any right or interest therein, as must operate as a bar to the maintenance of this action.

5. The deed of Joseph M. Thomas to the Horseshoe Mining and Milling Company vested the title to the whole of the North lode and the ground in controversy, in said company, unaffected by any equity in favor of plaintiffs.

Let judgment and decree be entered in favor of defendants accordingly, for a dismissal of the complaint upon the merits, and for the costs of this action.

By the court,

JOSEPH B. MOORE, *Judge.*

Judgment.

This action having been brought on to be heard upon the regular call of the calendar upon the issues joined by the complaint and answer, Messrs. Martin & Mason and Frank McLaughlin appearing for plaintiffs, and Edwin Van Cise and G. C. Moody appearing for defendants, and the court having heard the evidence and proofs adduced, and argument of counsel, and having made and filed its decision in favor of the defendants, and being fully advised in the premises: now, therefore, on motion of the attorneys for the defendants:

It is ordered, considered, adjudged and decreed, that the plaintiffs take nothing by this action, but that their complaint be and the same is hereby dismissed upon the merits of the action.

31–33 It is further ordered, considered and adjudged that the defendants have and recover of and from the plaintiffs the costs of this action, taxed at $—.

Done in open court this 18th day of August, 1898.

By the court,

JOSEPH B. MOORE, *Judge.*

* * * * * * *

34 & 35 In the Supreme Court, State of South Dakota.

Be it remembered, that at a term of the supreme court of the State of South Dakota, begun and held at Pierre, State of South Dakota, on the first Tuesday of October, A. D. 1901, on the 2nd day of the term, to-wit: on the 2nd day of October A. D. 1901.

Present: Howard G. Fuller, presiding judge, and Dighton Corson and Dick Haney, judges of said court, the following proceedings were had, and the following judgment was entered, to-wit:

36 File No. 1342.

In the Supreme Court, State of South Dakota, October Term, A. D. 1901.

Present: Howard G. Fuller, presiding judge, Dighton Corson and Dick Haney, judges of said court, and the officers thereof.

WILLIAM ELDER, as Administrator, ET AL., Plaintiffs and Appellants,

vs.

HORSESHOE MINING AND MILLING COMPANY ET AL., Defendants and Respondents.

This action coming on to be heard at the October A. D. 1899 term of this court, at the supreme court room, in the city of Pierre, State of South Dakota, upon the merits of the appeal without oral argument and the court having advised thereon and *and* filed its decision in writing.

It is considered, ordered and adjudged, that the judgment of the circuit court within and for Lawrence county, appealed from herein, be and the same is hereby affirmed.

And it is further ordered, that this action be and is hereby remanded to said circuit court for further proceedings according to law and the decision of this court.

And it is further ordered and adjudged, that respondent have and recover of the appellant costs and disbursements on this appeal, expended, taxed and allowed at eighty six & 15/100 dollars.

All of the judges concurring.

By the court,

[SEAL.]

H. G. FULLER,
Presiding Judge.

Attest: FRANK CRANE, *Clerk.*

37 STATE OF SOUTH DAKOTA, } ss:
County of Hughes, }

I, Frank Crane, clerk of the supreme court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of judgment of the supreme court of the State of South Dakota, in the above entitled action, wherein William Elder, as administrator, *et al.*, — plaintiffs and appellants, *versus* Horseshoe Mining and Milling Company, *et al.*, defendants and respondents, as the same now remains of record in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 17th day of December A D. 1902.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE, *Clerk,*
By D. H. SMITH, *Dep'y.*

Costs and disbursements taxed and allowed as follows:

Costs.

Before argument	$5 00
For argument	15 00
Making and serving case	
Term fees (— terms at $5.00)	

Disbursements.

Clerk's fees to perfect appeal record	
Stenographer's fees to perfect appeal record	
Printing brief (54 pages)	54 00
Printing abstract	
Printing additional abstract	
Fees clerk supreme court, beyond amount paid by appellants	11 90
Notary for this affidavit	25
Total	$86 15

38 [Endorsed:] (File No. 1342.) In supreme court, State of South Dakota. October term, 1901. William S. Elder, *et al.*, plaintiffs and appellants, *vs.* Horseshoe Mining and Milling Co., defendants and respondents. Filed in open court this 2d day of October, 1901. Frank Crane, clerk. Remittitur.

39 "H"—*a*—1342.

In the Supreme Court, State of South Dakota.

WILLIAM S. ELDER, as Administrator, etc., ET AL., Appellants,
vs.
HORSESHOE MINING AND MILLING COMPANY ET AL., Respondents.

Opinion. Filed —— —, 1901.

Appeal from circuit court, Lawrence county.

40 Martin & Mason, Frank McLaughlin, for appellants.
Edwin Van Cise, for respondent.

HANEY, *J.:*

In this action the plaintiffs seek to establish title to an undivided one-half interest in certain mining ground heretofore patented as the North lode and to compel the defendant, The Horseshoe Mining and Milling Co., to convey such interest. Defendant appealed from a judgment in favor of the plaintiffs, which was reversed by this court. 9 S. D. 636. The action having been again tried by the court, without a jury, judgment was rendered in favor of the defendants and the plaintiffs appealed.

An extended statement of the facts will be found in our former decision wherein it was held that notices of forfeiture addressed "to Rufus Wilsey, his heirs, administrators and to all whom it may concern" were sufficient in form to divest the plaintiffs of their title to the ground in controversy. It is now contended that these notices were ineffectual, for the reason that they were not published during the entire period prescribed by the Federal statute. The notices were published every day except Sunday from Monday January 7, 1889 to Tuesday April 2, 1889, both inclusive. The statute reads as follows: "Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of

his co-owners who have made the required expenditures." U. S. Revsd. St. § 2324. Our attention has not been called to any
41 case wherein the language of this statute has been construed with reference to the question here presented nor have any cases been found wherein the same language has been so construed. It is evident that the notice by publication shall continue during ninety days. The phrase "for at least once a week for ninety days" should be rendered "at least once a week during ninety days." That is to say there shall be at least one publication in each week during the prescribed period. In other words notice shall continue ninety days and one publication each week constitutes the notice required. Necessarily the ninety-days period begins with the first publication. In the case at bar it began on Monday January 7th. The publication on that day was sufficient for the week beginning on that day. Publication on the following and each succeeding Monday would certainly constitute at least one publication each week while so continued. There was a publication on each Monday from January 7, to April 1, both inclusive. If no publication was required after the first until the following Monday none was required after April 1, until the following Monday, April 8, and on that day the period of ninety days had been completed. Including the first day of publication ninety days ended on Saturday April 6th. Excluding the first day ninety days ended on Sunday April 7th. On that day the required notice had continued during ninety days and another publication on Monday April 8, was wholly unnecessary. Conceding that the statute should be strictly construed, we think, there was a complete compliance with its provisions respecting the duration of the publication. The judgment of the circuit court is affirmed.

[Endorsed:] Elder *vs.* Horseshoe Co. 87 N. W. 586.

42 "C"—*r.*

In the Supreme Court, State of South Dakota.

WILLIAM S. ELDER, as Administrator of the Estate of Rufus Wilsey, Deceased, and Elizabeth Wilsey, *et al.*, Heirs at Law of Rufus Wilsey, Respondents,
vs.
HORSESHOE MINING AND MILLING COMPANY ET AL., Appellants. } 696.

Appeal from circuit court, Lawrence county.

Opinion. Filed May 6, 1897.

43 Edwin Van Cise, for appellants.
Martin & Mason, Frank McLaughlin, for respondents.

CORSON, *P. J.:*

In January 1878 Charles H. Havens and Rufus Wilsey located a mining claim in the Black Hills, under the name of the "Golden

Sand" lode. In June, 1878 Wilsey died leaving a widow and several children, who then and have ever since, resided in the State of Iowa.

After the death of Wilsey, Havens continued to make the required annual expenditure upon the claim until 1892, when he sold the same to Thos. H. White, the managing agent of the defendant. At the time of his sale, Havens assumed to be the owner of the whole claim by virtue of proceedings taken under the provisions of section 2324 U. S. Rev. Stat. by which he sought to transfer the interest of Wilsey to himself.

The validity of these proceedings constitute the principal question in this case. To fully comprehend the various questions arising out of these proceedings, it may be proper to state that soon after the death of Wilsey one John Stephens was appointed administrator of his estate by the probate court of Lawrence county.

This administrator died in 1888 and there was no administrator of the estate of Wilsey after that time, until 1893, when the plaintiff Elder was appointed.

After Thos. H. White purchased the Golden Sand claim from Havens, he through Joseph M. Thomas, a nephew, caused the said Golden Sand claim to be relocated under the name of the "North" lode and an application for a U. S. patent to be made therefor, which was issued to said Thomas, who in November 1893 conveyed the patented claims to the defendant and appellant.

The undisputed evidence shows that the expenses for work
44 done upon the North claim after its location and the expense of obtaining a patent therefor was paid by the defendant,—The Horseshoe Mining Company.

In the summer of 1893, after the plaintiff Elder was appointed administrator of the estate of Wilsey, he together with the heirs of the estate tendered to said White, Thomas and the defendant one half of the amount of the annual expenditure required to be made upon the Golden Sand claim from 1878 to 1893 and demanded a deed for one half of the claim as patented by said Thomas, as the "North" lode. The parties refusing to make such conveyance, this action was instituted in the name of the administrator and heirs to recover one half of the property. The case was tried by the court without a jury and it found in favor of the plaintiffs and the defendant has appealed.

It will be noticed that from 1888 to 1893 there was no administrator of the estate of Wilsey. The record discloses no transfer of the Golden Sand location by Thos. H. White to the defendant and its title rests entirely upon the "North" Lode location.

It will be observed that the "Golden Sand" lode was located in 1878 by Havens and Wilsey; that Wilsey died during the same year; that Havens did all the annual work required upon the claim from 1878 to 1892 and that in the latter year he transferred the whole claim to the agent of defendant. The "Golden Sand" lode was then relocated by the agent of the defendant as the "North" lode, a patent issued therefor and that the same was conveyed to

the defendant, The Horseshoe Mining Co. It is claimed by the plaintiffs that the relocation was a fraud upon them. But in the view we take of the case, the only material question to be considered is as to the validity of the Havens' proceedings in his
45 attempt to acquire the half interest of Wilsey to the "Golden Sand" lode, for if he acquired a valid title to the Wilsey interest, then it was immaterial as to what disposition the defendant made of the claim subsequent to the transfer of the same by Havens, as it is not disputed that Havens' conveyance was in form a conveyance of the whole claim.

For the purposes of this case we shall assume as found by the court that the Golden Sand lode was properly located and was a good and valid location at the time of the death of Wilsey and that the annual assessment work was duly performed upon said claim, up to the time it was transferred by Havens to White in 1892. If, therefore, the proceedings taken by Havens divested the estate of Wilsey of its title, then the defendant obtained a good title to the whole claim under the North Lode location.

In order to establish the fact that Harvens had complied with the provisions of the U. S. statute and had thereby acquired the Wilsey interest, defendant offered in evidence two published notices, published at the same time, and being substantially copies of each other, except that the first covered a period of eight years and the latter one year. The notice is as follows: "Notice of forfeiture. To Rufus Wilsey, his heir's, administrators and to all whom it may concern: You are hereby notified that I have expended $800 in labor and improvements upon the Golden Sand lode, * * * as will appear by certificate filed on Jan. 2nd, 1889, in the office of the register of deeds of said Lawrence county, in order to hold said premises under the provisions of the laws of the United States and of this Territory, that being $100 per year, the amount required to hold the claim for the years ending December 31st, 1880, December 31st, 1881, Dec. 31st, 1882, December 31st, 1883, Dec. 31st, 1884, December 31st, 1885, December 31st, 1886 and December 31st, 1887. And if within ninety days after this notice by
46 publication you fail or refuse to contribute your proportion (400, being $50 for each of said years), your interests in said claim will become the property of the subscriber under section 2324 Revised Statutes of the United States."

To the introduction of this notice, the counsel for the plaintiffs interposed the following objections among others: "5th, because the notice is itself a nul-ity, because it is shown in the record, that Rufus Wilsey was at the time deceased, and a notice cannot run of forfeiture against a dead man, or his estate; neither is this notice addressed to the administrator of the estate in name, or by the proper designation; nor are the heirs enumerated in the notice; and a notice to the persons by description, is in all cases invalid. The further objection is made to this notice of forfeiture, that no sufficient pleadings upon the subject is set out in the answer. Further objection is made to this one now offered, that the notice is further

invalid because it undertakes to group the notice of the forfeiture for several years in one notice; also the further objection that no sufficient foundation for the publication of the notice instead of the personal service of it has been laid; and further that it is not shown that if the publication were proper, the Lead Herald, the paper referred to was the paper required by the statute in which it could be published."

The court sustained the objection stating that: "The objection will be sustained on the ground that the evidence in this case shows that Rufus Wilsey was dead, and that there was no legal administrator; his administrator was also deceased at the time this notice of forfeiture was published, and that therefore his co-owner gained nothing by it."

47 The second notice offered was for the year ending December 31st 1888 and the amount specified was $50. The same objection was taken and the same ruling made by the court.

Congress in 1872 enacted the present mining law and therein provided that all valuable mineral deposits should be "free and open to exploration and purchase and the lands in which they are found to occupation and purchase." The act prescribes the size of claims, manner of locating same, and that not less than $100 "worth of labor shall be performed or improvements made during each year." The act also provides that "the locators * * * their heirs and assigns * * * so long as they comply with the laws of the United States and with State, territorial and local regulations * * * shall have the exclusive right of possession and enjoyment" of the claim located.

Section 2324 after prescribing the value of the work to be done or improvements made during each year, further provides that "upon a failure to comply with the foregoing conditions of annual expenditure, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made: Provided, that the original locators, their heirs assigns, or legal representatives have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required thereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days and if at the expiration of ninety days after such notice in writing or by publication such delinquent shall fail or refuse to contribute his proportion of

48 the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

It will thus be seen that the estate of the locator or owner of a mining claim, before a patent is issued, is a conditional estate subject to be defeated by a failure to perform the required annual work upon the claim and that any qualified person may take advantage

of the failure to perform the condition and relocate the same. It follows, therefore, that the locator, his heirs and assigns must see that the condition is performed in order that their right to the possession may continue.

When the location is made by two or more, they become co-owners and one or more of the co-owners may do the required work upon the claim and thus perform the condition and thereby continue the right of themselves and co-owners to the exclusive possession of the claim. But no duty is imposed upon any one co-owner to do this. If the work is done, however, by one or more, the law requires the other co-owner or owners to contribute his or their share of the required expense and upon failure so to do, his or their interest becomes the property of those performing the work upon compliance with the requirements of the statute, which is the giving "such delinquent co-owner personal notice in writing or notice by publication in the newspaper published the nearest to the claim."

The statute makes no specific provision for any address or heading to the notice.

As will have been observed the notice in the case at bar is addressed "to Rufus Wilsey, his heirs, administrators and to all whom it may concern."

Wilsey having died in 1878, the notice as to him was nugatory.
49 It was also addressed to the administrators. There being none then living, it could have no effect in that respect. But it is also addressed to the "heirs, and to all whom it may concern."

At the time this notice was published the title to a one half interest in the claim was in the heirs, subject to the lien of the administrator for administration purposes and had been since the death of Wilsey. Section- 3400, 5772, 5860, 5862, Comp. Laws. In the Matter of the Estate of Woodworth, 31 Cal. 595; Weeks *v.* Hahn, 20 Cal. 627; Brenhan *v.* Story, 39 Cal. 179; Janes *v.* Throckmorton, 57 Cal. 368; Beckett *v.* Selver, 7 Cal. 238.

It is said in the latter case "that both the real and personal estate of the intestate vests in the heir subject to the lien of the administrator for the payment of debts and the expenses of administration and with the right of the administrator to present possession" and this says Mr. Justice Field in Weeks *v.* Hahn, *supra*, "is the true rule."

The provisions of our own statute upon the subject of succession and the provisions of our probate code bearing upon this subject are substantially, if not identically the same as the corresponding sections in the California code.

If this view of the laws is correct the heirs of Wilsey were in fact co-owners with Havens in the Golden Sand claim, from 1878 to the time of the publication of the notice; and the notice directed to them as heirs would seem to be sufficient to charge them with notice and require them to pay the estate's proportion of the expenses. If such was the position of the heirs the existence or non existence of an administrator could not affect them.

50 Having succeeded to the Wilsey interest, they took it burdened with the condition, that there share of the annual expenditure must be provided for. It was their duty, therefore, to see that the work was done.

The heirs are presumed to know the law and to know that this work was required to be done anually. The fact therefore that there was no administrator when the notice was published seems not to be very material.

But in the view we take of the provisions of the United States statute, from which we have quoted, the question of the rights of heirs and of administrators over the real property of a deceased becomes unimportant.

We are clearly of the opinion that Congress by the provision we are considering intended that the notice published should have the effect of notice to all parties who might have any interest under the co-owner who is in default and cut off all such interests whether the parties claiming are minors, heirs or lien holders, when, as in this case, the notice is so addressed as to include all parties. It is apparent that Congress by the notice intended to give to one or more co-owners who may cause the required work to be done upon the claim, a summary remedy for collecting from a co-owner his proportionate share of the expense, so necessarily incurred to protect the claim, either in money or by taking the co-owner's interest in the claim. The evident purpose and object of the law of 1872 was to encourage the exploration and development of the mineral lands of the United States and the sale of the same and all the provisions of the law seem to have been framed with that object in view. This is apparent from that part of the act providing that unless the annual expenditure shall be made each year the claim shall be subject to relocation and no rights of heirs, minors, widows or lien holders are excepted or reserved and no proceeding
51 judicial or otherwise, is required to divest the delinquent locator or locators of his or their interest or the interest of heirs or lien holders in the claim. If the required work is not performed and the claim is relocated after the expiration of the year the rights of all the parties are absolutely cut off, though the failure to do the work may have been caused by the death of the locator or locators during the year.

Again, when an application for patent is made the land officers are required to publish a notice,—not addressed to any one,—that such application has been made. If no adverse claim is filed within sixty days after the first publication of such notice, the rights of all parties holding adverse claims are cut off without regard to whether the parties claiming them, are minors, heirs, lien holders or otherwise. These illustrations sufficiently disclose the intention of Congress in the passage of the act of 1872.

We feel justified in the conclusion that Congress in adopting the provisions in regard to the disposition to be made of a defaulting co-owner's interest in the claim acted upon the same theory, and the published notice was intended to accomplish the same result as

the published notice of application for a patent, that is, to cut off the claims of all persons and vest in the co-owner a clear title to his co-owner's interest, without regard to the interest of minors, lien holders or incumbrancers. This, as I understand is the view taken by the United States Land Department of this provision.

That department requires abstracts of title, and when it appears by the record that the proper affidavits have been filed and the proper notice published, no further evidence is required. But if the construction contended for by the learned counsel for the respondent is correct, then the department should require proof that
52 the co-owner was living at the time the notice was published or if dead, that there was an administrator appointed and then performing the duties of his office, and that the heirs were not minors, and possibly a number of other facts in order that the applicant's title should be regarded as sufficient to entitle him to his patent. With such a construction as is contended for, the provision would be absolutely worthless and instead of conferring a benefit upon the co-owner, would be a delusion and a snare. No person could safely invest in a claim in the chain of title to which there was such a notice, however regular it might appear to be by the record.

It will be further observed on reading the provision that the conditions under which the notice may be served personally, is not prescribed, thus leaving it optional to the party when and under what circumstances he will serve the notice personally,—clearly indicating that in the opinion of Congress, the notice would ordinarily be published, and as we reason, in order that the lien of all parties might be cut off and that the true owner be vested with a clear title.

This construction of the law renders the notice, when rightfully published, effective in cutting off the claims of all parties and thus keeping the title clear and free from uncertainty and doubt. It gives to the notice the effect usually designed to be given to that class of notices when the claims of all persons are intended to be cut off as in the case of mortgages containing a power of sale; Reilly *v.* Phillips, 4 S. D. 604; probate court proceedings applications for patents, &c. The court was in error in excluding the notice and for this error the judgment of the court below must be reversed.

The other objections made to the admission of the published notice, it seems to us, do not merit very much consideration.
53 The objection that the heirs are not individually named in the notice cannot be sustained. To require of a co-owner to ascertain at his peril the names of all the heirs of delinquent co-owners, would be to impose upon him a burden the law never intended should be imposed and one that could be of no possible benefit to any one, as the heirs if personally named, would be no more likely to obtain actual notice than when named simply as heirs.

Neither do we think there is any merit in the objection that in the one notice the expenditure for eight years is included. Certainly if the parties interested intended to pay and thus protect their interest in the claim, they would be greatly benefited by grouping them all

in one notice. If they did not intend to pay, the grouping would be immaterial to them. The law does not prohibit it and we can discover no valid reason why it may not be done.

The objection that the notice was fatally defective because addressed to Rufus Wilsey and administrators, as well as heirs and to all whom it might concern is not tenable. It was one method of designating by whom the claim was located. Perhaps the notice addressed to the *heris* of Rufus Wilsey, deceased, would have been more technically correct but we think the form is not material so long as the statute is substantially complied with.

The insertion of the administrator could do no harm even if there was none.

There are numerous other errors assigned in the record but we do not deem it necessary to discuss them at this time.

The judgment of the circuit court and the order denying a new trial are reversed.

53½–56 [Endorsed:] Elder, adm'r, *vs.* Horseshoe M. & M. Co. Copy Sup. ct. Opinion. 9 S. D. 636 (70 N. W. 1060)

* * * * * * *

57 UNITED STATES OF AMERICA, *ss:*

To the Horseshoe Mining & Milling Company, Joseph M. Thomas, and Wilmot G. White, as administrator of the estate of Thomas H. White, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of South Dakota wherein William S. Elder, as administrator of the estate of Rufus Wilsey, deceased, and Elizabeth Wilsey, George Warren Wilsey, Charles Lincoln Wilsey, Edward Wilsey, and Frank Wilsey, heirs at law of the estate of Rufus Wilsey, deceased, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 21st day of January, in the year of our Lord one thousand nine hundred and three.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

58 [Endorsed:] Original. Citation.

STATE OF SOUTH DAKOTA, } ss:
County of Lawrence, }

I, Fred Doten, sheriff of Lawrence county, South Dakota, do horeby certify and return that the within citation came int- my hands for service on the 28th day January, 1903, and that I served the same on the Horseshoe Mining Company by delivering to and leaving a true and correct copy thereof with Anson Higby, general supt. of the above named company at Deadwood in Lawrence county, South Dakota on the 28th day of January 1903, and that I also served the citation on Wilmot G. White Thomas by delivering to and leaving a true and correct — thereof with her at Deadwood in Lawrence county, South Dakota on the 2nd day of February 1903.

FRED DOTEN, *Sheriff,*
By HARRY TRATHEN, *Deputy.*

Fees.

Citation	1.10
Cop	50
M'l'g	20
	$1.80

58½ *Affidavit of Service.*

Office of Martin & Mason.

STATE OF SOUTH DAKOTA, } ss:
County of Lawrence, }

Harry Trathen, deputy sheriff of the city of Deadwood, Lawrence county, South Dakota, being duly sworn, says he is over 21 years of age; that at the city of Deadwood, Lawrence county, South Dakota, on the 28th day of January A. D. 189–, he served the annexed citation on the Horseshoe Mining Company by delivering to and leaving a true and correct copy thereof with Anson Higby, general superintendent of said company, and on Wilmot G. White now Wilmot G. White Thomas in this action, by delivering to and leaving with her a true copy thereof. Service on both of the above named parties was made at Deadwood, in Lawrence county, South Dakota, on January 28th and February 2nd, 1903, respectively.

He further says that he knew the person- served as aforesaid to be the persons above named.

HARRY TRATHEN.

Sworn and subscribed to before me this 6th day of February, A. D. 1903.

[Seal of T. J. Laffey, Notary Public, South Dakota.]

T. J. LAFFEY,
Notary Public.

[Endorsed :] Citation.

59 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between William S. Elder, as administrator of the estate of Rufus Wilsey, deceased, and Elizabeth Wilsey, George Warren Wilsey, Charles Lincoln Wilsey, Edward Wilsey and Frank Wilsey, heirs at law of the estate of Rufus Wilsey, deceased, plaintiffs, and The Horseshoe Mining & Milling Company, Joseph M. Thomas, and Wilmot G. White, as administrator of the estate of Thomas H. White, deceased, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in ques-

60 tion the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiffs, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of January, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Due and personal service by copy of the within writ of error is hereby admitted at Denver, Colorado, this — day of —, A. D. 1903. —— ——, attorney for ——.

61 In the Supreme Court of the United States.

WILLIAM S. ELDER, as Administrator of the Estate of Rufus Wilsey, Deceased, and Elizabeth Wilsey, George Warren Wilsey, Charles Lincoln Wilsey, Edward Wilsey, and Frank Wilsey, Heirs-at-law of the Estate of Rufus Wilsey, Deceased, Plaintiffs,

vs.

HORSESHOE MINING & MILLING COMPANY, Joseph M. Thomas, and Wilmot G. White, as Administratrix of the Estate of Thomas H. White, Deceased, Defendants.

} Bond on Writ of Error.

Know all men by these presents, that we, William S. Elder as administrator of the estate of Rufus Wilsey, deceased, and Elizabeth Wilsey, George Warren Wilsey, Charles Lincoln Wilsey, Edward Wilsey and Frank Wilsey, heirs at law of the estate of Rufus Wilsey, deceased, as principals, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto The Horseshoe Mining & Milling Company, Joseph M. Thomas and Wilmot G. White as administratrix of the estate of Thomas H. White, defendants in error above named, in the sum of five hundred ($500.00) dollars to be paid to the said defendants in error, their successors, executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 11th day of November, 1902.

Whereas, lately at a session of the supreme court of the State of South Dakota, in a suit pending in said court between the above named plaintiffs and the above named defendants, a final judgment was entered against the said plaintiffs, and the said plaintiffs having applied for and obtained from said court, a writ of error to
62 reverse the judgment in the aforesaid suit and a citation directed to said defendants in error is about to be issued, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, D. C.

Now, the condition of the above obligation is such that if the said plaintiffs in error shall prosecute their writ of error to effect and shall answer all damages and costs that may be awarded against

them, if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Witness their hands this 11th day of November, 1902.

WM. S. ELDER,
As Administrator, &c.,
ELIZABETH WILSEY,
GEO. WARREN WILSEY,
CHARLES LINCOLN WILSEY,
EDWARD WILSEY,
FRANK WILSEY,
Heirs-at-law, &c.,
By MARTIN & MASON,
Their Attorneys.
THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By JAMES P. HYMER, *Gen'l Ag't, and*
N. T. MASON, *Att'y.*

{Seal of the United States Fidelity & Guaranty Company, Incorporated 1896.}

Approved:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the U. S.

Jan'y 21, 1903.

STATE OF SOUTH DAKOTA, } ss:
County of Lawrence, }

On this 11th day of November in the year 1902, before me, T. J. Laffey, a notary public within and for said county and State, personally appeared James P. Hymer and N. T. Mason, known to me to be the general agent and attorney, respectively, of the corporation that is described in and that executed the within instrument, and acknowledged to me that such corporation executed the same.

Approved,

[Seal of T. J. Laffey, Notary Public, South Dakota.]

T. J. LAFFEY,
Notary Public.

63 [Endorsed:] Original. In the Supreme Court of the United States. William S. Elder as adm'r etc., *et al.*, plaintiffs *vs.* Horseshoe Mining & Milling Company, *et al.*, defendants. Bond on writ of error. Martin & Mason, att'ys for plaintiffs, Deadwood, S. D.

64 In the Supreme Court of the United States.

WILLIAM S. ELDER, as Administrator, etc., ET AL., Plaintiffs in Error,
vs.
HORSESHOE MINING & MILLING COMPANY ET AL., Defendants in Error.

Statement of Parts of Record, etc.

The following is a statement of the errors on which plaintiffs in error intend to rely and of the parts of the record which they think necessary for the consideration thereof.

I.

Statement of Errors.

The South Dakota supreme court erred in holding:

1. That the published notice of forfeiture under Revised Statutes of the United States, section 2324, addressed to "Rufus Wilsey, his heirs, administrators and to all whom it may concern" was sufficient to divest the title of plaintiffs in error, though said Wilsey was dead during the time of publication and there was no administrator of his estate.

2. That a published notice of forfeiture under Revised Statutes of the United States, section 2324, is sufficient to divest the title of plaintiffs in error, though alleged delinquencies in the performance of representation work for several years were grouped in one notice.

3. That a notice of forfeiture under Revised Statutes of the United States, 2324, is sufficient to divest title of plaintiffs in error, though the same was published in a daily newspaper and ninety (90) days had not expired between the first and last publication thereof, to-wit: between January 7th, 1889, the first publication, and April 2nd, 1889, the last publication thereof.

4. In affirming the second conclusion of law in the decision
65 of the lower or circuit court of the State of South Dakota.

5. In affirming the judgment rendered in the lower or circuit court of the State of South Dakota and in rendering judgment in favor of the defendants in error and against the plaintiffs in error, wherein by the law of the land, the said judgment ought to have been given for the said plaintiffs in error and against the said defendants in error.

II.

Statement of Parts of Record, etc.

1. Complaint.
2. Answer.
3. Findings of fact.
4. First and second conclusions of law.
5. Judgment.
6. Two opinions of State supreme court.

EBEN W. MARTIN,
NORMAN T. MASON,
Att'ys for Pl'ffs in Error.

66 [Endorsed:] In the Supreme Court of the United States. William S. Elder as adm'r etc. *et al.*, pl'ffs in error. *vs.* Horseshoe Mining & Milling Co., *et al.*, def't in error. Statement of parts of record, etc., Due and personal service by copy of the within statement is hereby admitted at Deadwood, South Dakota, this 19 day of May A. D. 1903 Moody, Kellar & Moody. Chambers Kellar, G. C. Moody. J. C. Moody, attorney for ——. Eben W. Martin, Norman T. Mason, att'ys for pl'ffs in error.

67 [Endorsed:] File No. 18,838. Supreme Court U. S. October term, 1902 Term No. 610. W. S. Elder *et al.* P. E. *vs.* The Horseshoe Mining & Milling Co *et al.* Assignment of errors & designation by pl'ffs in error of parts of record to be printed. Filed May 23d, 1903.

68 In the Supreme Court of the United States.

WILLIAM S. ELDER, as Administrator of the Estate of Rufus Wilsey, Deceased, and Elizabeth Wilsey *et al.*, Plaintiffs in Error, *vs.* THE HORSESHOE MINING & MILLING Company, Joseph M. Thomas, and Wilmot G. White, as Administrator of the Estate of Thomas H. White, Deceased, Defendants in Error.	No. 220. October Term, 1903.

To Eben W. Martin, Esq., and Norman T. Mason, Esq., attorneys and counselors for plaintiffs in error, and to Honorable James H. McKenney, clerk of said court:—

You are notified that the defendants in error designate the following additional parts of the record herein which they think material and request that the same be printed for the consideration of the

court herein, to wit: the third, (3rd,) fourth (4th), and fifth (5th) conclusions of law.

Dated August 14th 1903.

Very respectfully yours,

G. C. MOODY,
CHAMBERS KELLAR,
JAMES C. MOODY,
Attorneys for Defendants in Error.

69 [Endorsed:] In the Supreme Court of the United States. William S. Elder *et al.* plaintiffs in error, *vs.* Horseshoe Mining Company *et al.* defendants in error. No. 220, October term, 1903. Personal service of the within statement and notice admitted this 14th day of August, 1903. Martin & Mason, attorneys for plaintiffs in error.

70 [Endorsed:] File No. 18,838. Supreme Court U. S. October term, 1903. Term No. 220. Wm. S. Elder *et al.* P. E. *vs.* Horseshoe Mining Co. *et al.* Designation by def't in error of additional parts of record to be printed, & proof of notice of same. Filed Aug. 18, 1903.

Endorsed on cover: File No. 18,838. South Dakota supreme court. Term No. 220. William S. Elder, as administrator of the estate of Rufus Wilsey, deceased; Elizabeth Wilsey *et al.*, plaintiffs in error, *vs.* The Horseshoe Mining and Milling Company, Joseph M. Thomas, *et al.* Filed February 18, 1903.